STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Borello, P.J. and White and Smolenski, J.J.

MILISSA McCLEMENTS,

Plaintiff-Appellee and
Cross Appellant,

-vs-

FORD MOTOR COMPANY,

Defendant-Appellant and
Cross Appellee.

Supreme Court Case No. 126276
Court of Appeals No. 243764

Oakland County No. 00-034444-CL
Hon. Wendy L. Potts

BRIEF OF APPELLEE MILISSA McCLEMENTS

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

The plaintiff Milissa McClements accepts the Statement of Jurisdiction set forth in Ford's Brief on Behalf of the Appellant. She further notes that this Court granted her Application for Leave to File a Cross Appeal and has jurisdiction over that cross appeal pursuant to MCR 7.302(d)(2).

STATEMENT OF QUESTIONS PRESENTED

The plaintiff appellee and cross appellant Milissa McClements does not accept the Statement of Questions presented in the Brief of the Appellant Ford Motor Company. She asserts that the Questions Presented should be stated as follows:

I

Did the Court of Appeals properly hold that the plaintiff, an employee of AVI Food Systems, Inc. at the Wixom Assembly Plant, could assert a claim for negligent retention against Ford Motor Company where she was the victim of two assaults and batteries perpetrated by Daniel Bennett, a manager at that plant, where Ford knew or should have known that Bennett posed a danger of perpetrating such assaults in the workplace?

The Court of Appeals answered "Yes."

The Oakland County Circuit Court answered "No."

The Appellee answers "Yes."

The Appellant Ford Motor Company answers "No."

II

Did the Court of Appeals properly hold that the plaintiff had produced evidence sufficient to require a jury to determine whether Ford had negligently retained or supervised Bennett in his position as a superintendent at the Wixom plant, where she offered evidence that if believed established that before Bennett assaulted McClements Ford knew or should have known that he had used a Ford test car to stalk and expose himself to high-school girls and had exposed himself to and assaulted Ford employee Justine Maldonado on three occasions?

The Court of Appeals answered "Yes."

The Oakland County Circuit Court answered "No."

The Appellee answers "Yes."

The Appellant Ford Motor Company answers "No."

III

Does the Elliott-Larsen Act or the Michigan Rules of Evidence preempt the plaintiff's claim that Ford negligently retained Bennett in its employment?

The Court of Appeals did not answer the question because Ford did not present it to that Court.

The Oakland County Circuit Court did not answer the question because Ford did not present it to that Court.

The Appellee Milissa McClements answers "No."

The Appellant Ford Motor Company answers "Yes."

IV

Should this Court apply the standards of the common law to the plaintiff's claim for negligent retention rather than the standards recently developed by the Michigan Court of Appeals for respondeat superior liability under the Elliott-Larsen Act?

The Court of Appeals answered "Yes."

The Oakland County Circuit Court answered "No."

The Appellee answers "Yes."

The Appellant Ford Motor Company answers "No."

INTRODUCTION

From the beginning of this litigation, Milissa McClements, an employee of AVI Food Systems, Inc., has asserted that Ford Motor Company is responsible for the sexual assaults that Daniel Bennett perpetrated upon her at Ford's Wixom Assembly Plant because Ford had negligently retained Bennett in his position as a superintendent at that plant after receiving reports that he had used a Ford test car to expose himself to three high school girls on I-275 *and* that he had on three occasions exposed himself to and assaulted Ford employee Justine Maldonado.

Ford has apparently decided that if those facts are accepted as true, it cannot successfully challenge the decision of the Court of Appeals in this case. It therefore asks this Court to disregard the reports filed by Maldonado and to pretend that the question presented is what Ford's obligation would be have been if it had known only that Bennett had a "single misdemeanor conviction."

In order to misstate the question in this way, Ford must misstate McClements' claim as it does in the first paragraph of its Brief: "...Plaintiff claimed that Ford had a duty to protect her from alleged sexual harassment by [Bennett] because Ford knew that Mr. Bennett *once* had a misdemeanor conviction for indecent exposure" (Ford Br, 1, para 1)(emphasis added). Ford repeats that misstatement of plaintiff's claim throughout its brief (Ford Br, 7, para 1, 14, para 2, 17, para 2).

More seriously, Ford also misstates the facts—including its own prior statement of those facts—in order to sustain its false presentation of the issue before this Court. Specifically, after ignoring Maldonado's reports for the first six pages of its brief (Ford Br, 1-6), Ford finally acknowledges those reports—but then asks this Court to disregard

them because, it says, there is purportedly "...no evidence that Ms. Maldonado actually complained to anyone *before* Plaintiff's alleged encounters with Mr. Bennett" (Ford Br, 7-8)(emphasis in original).

In the brief that Ford filed in the Court of Appeals, however, Ford specifically stated that Maldonado had complained to Ford officials *before* Bennett assaulted McClements: "...[A]ccepting Plaintiff's allegations at face value, only Ms. Maldonado had complained, purportedly in late October 1998, *just before the events in question* [in this case]" (Ford Ct of Appeals Brief, 23, n 8; Appellee Apx, 31b-32b)(emphasis added).

Nor was that a slip at the keyboard. Ford's Brief in the Court of Appeals again stated that Maldonado reported Bennett's abuse of her *in October 1998* (Ford Br in Ct of Appeals, 14-15, n 4; Appellee Apx, 22b-23b) *and* specifically stated that Bennett assaulted McClements *after a three or four week period that began in November 1998*:

> ...[*I*]*n approximately November 1998*, Mr. Bennett chatted with Plaintiff at her cashier station in Wixom Plant Café 2 on three or four occasions, asking Plaintiff to meet him after work at a Taco Bell. Plaintiff declined Mr. Bennett's invitations. *Shortly thereafter*, Mr. Bennett entered Café 2 between break periods, when Café 2 was closed, came up behind Plaintiff and kissed her. *A few days later*, Mr. Bennett again entered Café 2 between break periods and again attempted to kiss Plaintiff, but she thinks she succeeded in pushing him away. These events transpired *during a three or four week period in* 1998 and Plaintiff had no contact with Mr. Bennett other than *during this three or four week period.*
>
> (Ford Br in Ct of Appeals, 3; Appellee Apx, 11b)(footnotes and record citations omitted)(emphasis added).

Ford now asks this Court to find that there is no evidence to support the Statement of Facts that *Ford* submitted to the Court of Appeals. That is an extraordinary request—and Ford should not be allowed to pursue it because it amounts to sandbagging the Court of Appeals on a vital claim.

Ford's new claim is also without support in the record. Without repeating the detailed description of *what* Bennett did to Maldonado and to McClements, the plaintiff has set forth below the evidence establishing *when* Maldonado filed her reports and *when* Bennett assaulted McClements. As will be seen, that evidence, especially when construed in a light most favorable to McClements, establishes that Ford correctly informed the Court of Appeals that Maldonado reported Bennett's abuse of her to Ford officials *before* Bennett assaulted McClements.

Moreover, as to both the actual question presented and Ford's misstatement of that question, Ford wrongly presents the issue as one of law—the scope of its duty. But precedents in this state and other states have solidly established that Ford has a legal duty to use due or reasonable care to prevent Bennett from sexually abusing or assaulting invitees on its premises. The real question presented is not the scope of Ford's duty—but, rather the sufficiency of the evidence supporting the claim that Ford breached that duty.

As this Court has long held, however, where there is evidence of a breach—as there clearly is in this case—the jury must determine not only what Ford knew and when it knew it. It must also decide whether Ford's actions discharged its duty to use reasonable care in light of the informed judgment of the community as to what reasonable care was, given what Ford knew and what its available options were.

Ford's attempt to have this Court substitute its judgment for that of the jury is not supported by the record in this case—or by long-established precedent under the law of negligence in general and of negligent retention in particular.

Ford's other arguments have even less merit.

As it did in the Court of Appeals, Ford claims that it could disregard Maldonado's reports because, it says, she did not file them with "high management officials" (Ford Br, 35-37). The Court of Appeals, however, rightly held that the common law did not require that she file them with such officials, and, even if it did, there was evidence from which a jury could conclude that one or more of the officials who knew of Maldonado's complaints were part of "higher management" (Pl Apx, 53a-55a).

Similarly, contrary to Ford's claims, neither the Elliott-Larsen Act, MCL 37.2101, et. seq., nor the Michigan Rules of Evidence eliminated the common law claim for negligent retention (Ford Br, 25-33). Indeed, the company itself apparently agreed at one point, because its brief in the Court of Appeals did not suggest, much less make, those arguments either (Appellee Apx, 1b-45b).

As the weakness of Ford's old arguments and the sudden appearance of its new arguments so clearly reveal, the Court of Appeals properly held that the plaintiff's claim for negligent retention should be remanded for trial so that a jury can determine what Ford knew, when Ford knew it, whether Ford used reasonable care, and, if not, whether Ford's failure was a proximate cause of Bennett's later assaults upon McClements (Pl Apx 53a-55a).

SUPPLEMENTAL STATEMENT OF FACTS

In McClements' Brief in Support of her Cross Appeal, she described the events giving rise to her claim. As described in more detail in that brief, she asserted that the following events occurred in the order and on the approximate dates indicated below:

(1) August 1995. Ford's top officials at Wixom do nothing after receiving reports that Bennett had used a Ford M-10 car to follow and expose himself to three high-school girls on I-275.

(2) January—February 1998. Bennett assaults Maldonado, a Ford production worker, on the Wixom grounds on two occasions, exposing himself and tugging at Maldonado's clothes on both occasions and forcing her hand onto his exposed penis on one occasion.

(3) March 1998. AVI, Inc. hires McClements to work in its cafeterias at the Wixom plant.

(4) June 1998. Bennett follows Maldonado off I-275 onto Michigan Avenue. In a parking lot, he asks her for sex, pulls at her blouse, and then returns to his car and masturbates as she drives away.

(5) Late October 1998. Maldonado reports Bennett's assaults to Joseph Howard, the Production Manager at Wixom and her uncle by marriage.

(6) Late October 1998. Maldonado reports Bennett's assaults to David Ferris, her former supervisor and an old friend, who is on temporary assignment in Labor Relations.

(7) Late October 1998. Ferris confronts Bennett and, when Bennett laughs in his face, reports Bennett's harassment of Maldonado to Jerome Rush, the Director of Labor Relations at Wixom.

(8) Late November-early December 1998. Bennett sexually assaults McClements on two occasions in Café 2 by grabbing her and attempting to kiss her forcibly.

(See Statement of Facts, Pl Br in Supp of Cross Appeal, 3-12).

In the brief that it has filed in this Court, Ford concedes that for purposes of ruling on its motion for summary disposition, there is record evidence that supports the fact that all of these events occurred—and that there is record evidence that the events in paragraphs one through four occurred on the dates indicated (Ford Br, at 4-7, 42-44).

After conceding the point in the Court of Appeals, however, Ford now asserts that there is no evidence that the events in paragraphs (5) through (7) occurred before the events described in paragraph (8) (Ford Br, 8). In support of that belated assertion, it string cites references to McClements' deposition, coupled with assertions about her testimony. It does not, however, analyze those sections of her testimony that it has

cited—nor does it even refer to numerous other sections of her testimony which establish when Bennett assaulted her (Ford Br, 6, 8).

Beginning, however, with the reports by Maldonado summarized in paragraphs (5) and (6), Maldonado fixed the dates of those reports by the fact that she went off on a medical leave for her knee on October 19, ultimately resulting in knee surgery on November 2, 1998. She testified that Howard came to her house and that she filed her reports with him "towards the end of October"—a time that she described as just before her November 2 knee surgery (Pl Apx, 98a). She further testified that she filed her reports with Ferris in the last few days of October when she "took in her medical paper saying that [she] *would be* off for surgery" (Pl. Apx, 97a)(emphasis added).

Ferris, in turn, fixed the date of his report to the Director of Labor Relations by stating that he confronted Bennett two or three days after his conversation with Maldonado and that he conveyed the report to the Director of Labor Relations one day after that (Pl Apx, 107a). Taken together, Ferris's and Maldonado's testimony thus establish that Ferris, Howard and the Director of Labor Relations all knew by November 2, 1998, that Maldonado had reported that Bennett had perpetrated severe sexual harassment upon her earlier in 1998, both inside and outside the Wixom plant.[1]

Turning to Bennett's assaults upon McClements, she testified that those assaults occurred in late November or early December 1998—that is, approximately a month *after* Ford learned what Bennett had done to Maldonado:

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[1] Ford states that Ferris could "only guess" as to the dates on which Maldonado complained and on which he reported her complaints to Rush (Ford Br, 44). It is true that Ferris did not know those dates. But Ford fails even to address the fact that Maldonado did know when she complained and that Ferris testified that he informed Rush of her complaints three or four days after she told him about them.

Q: [By Ms. Baumhart] All right? And when was that? When was the first time that he attempted to stick his tongue in your mouth?

A: [By Ms. McClements] You mean the time of day or time of year or—

Q: Let's start with the time of year.

A: Okay. That was, I would say, late November, early December of '98.

(Ford Apx, 190a).

In the section of the deposition that Ford quotes, McClements fixed the date by stating that she recalled that Bennett had asked her about her holiday as he came through the serving line—and she knew that conversation occurred before he assaulted her because she did not talk to him after those assaults. She testified that the holiday was Thanksgiving because she knew the weather was cold (Ford Apx, 191a). She emphatically denied that the holiday at issue was Labor Day and repeated again that she thought that the assaults had occurred after Thanksgiving (Ford Apx 191a-192a).

Ford wrongly asks this Court to weigh the credibility of those sections of McClements' testimony that it cites. It then compounds that error by failing even to cite repeated questions on the third day of the deposition, where Bennett's counsel *assumed*—and McClements agreed—that the second assault had happened in December 1998 (Dep of McClements, 554, 556, 570-572; Appellee Apx, 54b, 56b).

Similarly, Ford does not cite other portions of McClements' testimony where she provided numerous details that corroborate the fact that Bennett assaulted in her in late November or early December 1998. For example, in response to questions from Bennett's counsel on the third day of her deposition, McClements made clear that the Christmas holiday occurred *shortly after* the second time that Bennett assaulted her:

> Q: [By Mr. Morgan] What you did in the form of telling him [Bennett] no definitively on the second occasion he allegedly attempted to kiss you was effective in making him go away, correct?
>
> A: [By Ms.McClements] Well, *shortly after was the holiday, the Christmas holiday*, and we were off, and I believe Mr. Bennett was transferred to another area in the plant, or switched shifts, or something. But after the Christmas holiday, I didn't see him.
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> (Dep of McClements, 571-572; Appellee Apx, 56b)(emphasis added)(Objections and colloquy between counsel omitted).

Likewise, in a statement signed for AVI during the time the litigation against Ford was pending—and introduced in McClements' deposition—she described the second assault and said "*Soon after*, I was moved to another cafeteria..." (Dep of McClements, 418-421, Ex 28; Appellee Apx, 51b, 59b)(emphasis added). As McClements had testified earlier in her deposition, AVI moved her out of Cafeteria 2, where the assaults occurred, "just prior" to February 1, 1999, when her father died (Ford Apx, 166a-167a, 206a).

Finally, Ford fails to mention the testimony that establishes *when* McClements began working in Café 2. In the section of her deposition that Ford focuses on, McClements testified that she first worked in Café 2 in early fall 1998 (Ford Apx, 166a-167a). In entirely different sections of the deposition, she confirmed that date by describing the chronology of where she had worked at Wixom. As she testified, after her March 9, 1998 hire, she worked in Café 1 for three days, went to Café 2 for three months, returned to Café 1 for a few months, and then ended up going back to Café 2 in early fall 1998. Putting those dates together, she could not have returned to Café 2 until early fall—that is, *after* Labor Day. The only holidays after that date were Veterans Day,

Thanksgiving and Christmas—all of which occurred after November 2 (Dep of McClements, 25-26; Appellee Apx, 47b).[2]

In its brief, Ford ignores all of this evidence in favor of misleading references claiming that McClements' Complaint said the assaults occurred in September 1998--despite the fact that the actual statement in the Complaint is that Bennett *started talking to her in September 1998* (Ford Br, 5, citing Ford Apx 56a, 288a).

Similarly, Ford complains about McClements' inability to recall whether the assaults occurred before or after the dental surgery that she had on November 24, 1998—even though McClements specifically testified that she could not say for sure because she did not relate those two events to each other in her memory (Ford Br, 5-6, citing, Ford Apx, 191a, 216-17a, 247-248a).

None of the evidence that Ford cites rises to the level of a prior inconsistent statement—much less to a basis for affirming the circuit court's decision granting Ford's motion for summary disposition.

As Ford conceded in the Brief that it filed with the Court of Appeals, assuming that the evidence offered by the plaintiff is true, and drawing all reasonable inferences in her favor, the question before the Court is whether McClements has stated a claim that her injury was a proximate result of the fact that Ford negligently retained Bennett after it learned that he had followed and exposed himself to the high-school girls and after it learned that he had assaulted and exposed himself to Maldonado on three occasions.

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[2] AVI's collective bargaining contract provided that its employees would receive the same holidays as were provided under the UAW-Ford contract (Ford Apx, 258a-259a). In fall 1998, those holidays included Veteran's Day (which was celebrated on November 13), Thanksgiving, and Christmas.

ARGUMENT

I

STANDARD OF REVIEW

This Court reviews the circuit court's decision granting the defendants' motion for summary disposition *de novo*. *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 617, 537 NW 2d 185 (1995).

II

THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT'S DECISION GRANTING THE DEFENDANT FORD'S MOTION FOR SUMMARY DISPOSITION.

A. The Court of Appeals properly concluded that Ford had a duty to take reasonable steps to protect invitees from sexual assaults by a supervisor whom it knew had previously harassed and assaulted others.

In 1971, this Court declared that it was undisputed that the law of Michigan imposed the following duty upon an employer towards those whom it invited onto its premises:

> [The] duty imposed upon an employer who invites the general public to his premises, and whose employees are brought into contact with the members of such public in the course of the master's business, is that of exercising reasonable care for the safety of his customers, patrons, or other invitees. It has been held that in fulfilling such duty, an employer must use due care to avoid the selection or retention of an employee whom he knows or should know is unworthy by habits, temperament, or nature, to deal with the persons invited to the premises of the employer.

Hersh v Kentfield Builders, 385 Mich 410, 412-413, 189 NW2d 286 (1971).

As the above passage reveals, the Court recognized that an employer has a duty to use due or reasonable care in the selection, retention *and* supervision of any employee whom it has reason to believe poses a danger of committing a tort or other wrongful

conduct upon persons whom the employer has invited onto its premises. *Id.*[3] As this Court recognized in *Hersh*, Michigan has imposed that duty of due care at least since *Bradley v Stevens*, 329 Mich 556, 46 NW2d 382 (1951)—and the common law of the United States has imposed it for much longer than that. See *Hersh*, 385 Mich at 412, citing 34 ALR 2d 390, s 9.

In the thirty years since *Hersh* was decided, no Michigan authority has questioned that duty. Moreover, the supreme courts in other jurisdictions have repeatedly reaffirmed it. See, e.g., *Ponticas v KMS Investments*, 331 NW 2d 907, 910 (Minn Sup Ct 1983) (tenants sexually assaulted by custodian); *Moses v Diocese of Colorado*, 863 P 2d 310 (1993)(parishioner sexually assaulted by priest); *DiCosala v Kay*, 91 NJ 159, 450 A. 2d 508, 515 (1982)(minor shot by ranger in private camp).

Despite the widespread and longstanding recognition of the duty to use due care in the selection or retention of employees, Ford curtly asks this Court to "clarify," "limit," or "simply overrule" it (see Ford Br, at 14, citing *Williams v Cunningham Drug Stores, Inc.*, 429 Mich 495, 418 NW 2d 381 (1988).

But *Cunningham*, the primary authority cited by Ford, demonstrates that there is no basis whatever for Ford's request that this Court overrule *Hersh*. Specifically, in *Cunningham*, this Court held that a landowner had no duty to provide protection against

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[3] The duties are sometimes stated as negligent hiring, negligent retention and negligent supervision. As there is no evidence as to what Ford knew when it hired Bennett, the plaintiff's claims in this case are for negligent retention and negligent supervision. She asserts that Ford negligently retained Bennett because is should have fired him after learning what he had done on I-275 and to Maldonado. Alternatively, she asserts that Ford failed to supervise Bennett by failing to discipline him in any way for what he had done. For brevity, she refers to her claim in the remainder of this brief as one for negligent retention, recognizing that the jury might decide instead that Ford negligently supervised Bennett.

armed robberies committed by strangers on its premises because it had no control over those events, because such protection was the job of the police, and because requiring the defendant to provide it would impose indeterminate and enormous burdens on businesses that operated in areas where crime was high. But in so holding, this Court reaffirmed that a landowner had a duty to protect invites from dangers on the land or in the buildings or premises that it controlled, because the landowner was "the person ...best able to provide a place of safety" from those dangers. *Cunningham*, 429 Mich 499-500.

For similar reasons, this Court had previously held—and should continue to hold—that an employer has an equivalent duty to use reasonable care to protect invitees from injury at the hands of dangerous employees whom it knows of and controls because it is the person "best able to provide a place of safety" from those dangers. *Hersh,* 385 Mich at 412-413.

Ford's request that this Court "limit" or "clarify" *Hersh* has no more support than its request that this Court overrule *Hersh*. At base, Ford protests that the duty established by *Hersh* is "too vague" and that in applying that standard the jury is required to weigh competing interests that only the Court should weigh (Ford Br, 20-21).

As this Court has long recognized, however, the duties imposed by the law of negligence are necessarily stated generally—the duty to use due or reasonable care. In historic cases, this Court has recognized that the jury must apply those general standards by determining what the defendant knew and whether, in light of that knowledge, its actions were reasonable in light of the informed judgment of the community, which is represented by the jury. See, e.g., *Detroit & Milwaukee R. Co. v Steinburg*, 17 Mich 99, 122-123 (1868)(Cooley, J).

In *Hersh*, this Court merely applied that principle to the employer's duty to protect persons against employees known to be dangerous. After recognizing that society has an interest in assuring the employment and rehabilitation of ex-offenders, this Court held that the welfare of the ex-offenders and the community is "better served by a rule of law which requires a jury—the conscience of the community—rather than a judge" to evaluate the significance of the past crime and the facts that gave rise to it and to determine whether "the employment of a given individual in a given job under given circumstances [was] a reasonable course to follow." *Hersh*, 385 Mich at 416.

As noted, Ford attempts to misstate the question before this Court as what a company's obligation would be if it knew only that one of its employees has a single misdemeanor conviction on his record. For two reasons, even Ford's misstatement of the question makes clear that the issue presented is one of fact not law.

First, because the Elliott-Larsen Act allows Ford to deny employment to those convicted of crimes, MCL 37.2205, Ford cannot claim that the jury should be prohibited from finding that it breached its duty of due care by not considering a conviction of which it clearly had knowledge.

Second, and more fundamentally, even Ford's misstatement of the question makes clear that the question is one of fact, not law, because its resolution depends upon weighing all the circumstances, including the facts that gave rise to the conviction and the nature of the job that the particular employee performed. *If,* for example, all that a potential employer knew was that a man had been convicted of a "single misdemeanor"—*and* that the misdemeanor consisted of exposing himself to high-school girls while test driving a company car—the jury could certainly conclude that that

employer would be negligent if it retained that man as the coach of a girl's volleyball team, as a kindergarten teacher, or in a host of similar positions.

Similarly, insofar as Ford is concerned, if the jury determined that Bennett, as a superintendent, had the power and the opportunity to abuse women in isolated areas of a large plant at all hours of the night, it could reasonably conclude that Ford breached its duty of due care either by retaining him in that position or by failing even to warn him that a repetition of conduct like that on I-275 could cost him his job.

The question is one of fact, not law.

That is even clearer when the actual question before this Court is honestly stated. If the jury determined that Ford knew that Bennett had used a Ford test car to follow and expose himself to high-school girls *and* had then assaulted and exposed himself to Justine Maldonado twice inside the plant and once outside the plant, it could reasonably conclude that Ford was negligent in retaining Bennett in his position as superintendent.

Ford claims that the plaintiff seeks a "vast expansion" of *Hersh*. But requiring that a company take reasonable steps to protect invitees from sexual assaults by a man known to have perpetrated serious felonies inside the plant and a serious misdemeanor outside the plant is not an expansion of *Hersh* at all. It is, rather, squarely in the middle of the duty established by *Hersh* and, as will be seen, by precedents from every jurisdiction that has Ford has cited in this case.[4]

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[4] As is apparent from a statement of the elements of the cause of negligent retention, an Elliott-Larsen claim that a company allowed a hostile environment to persist is a statutorily-created subset of a negligent retention claim. The difference is this: the conduct that the company must take reasonable steps to prevent—sexual, racial or other forms of harassment—includes, but is not limited to, harassment that constitutes the common-law torts of assault, assault and battery, and intentional infliction of mental distress.

B. Ford knew or should have known, that there was a serious risk that Bennett would sexually assault other women in the Wixom plant.

As set forth above, to establish a claim of negligent retention, the plaintiff must show that Ford knew of past misconduct by Bennett that should have alerted it to the danger that he would sexually harass or assault others in the future.[5] In evaluating that evidence, the jury must review all of Bennett's past misconduct to determine the scope and degree of the risk that he posed—in order to determine whether the steps that the company took were reasonably calculated to abate that risk. *Hersh*, 385 Mich at 415.[6]

Judged by these standards, it is abundantly clear that the Court of Appeals properly held that the circuit court had erred in granting the defendant Ford's motion for summary disposition because there were, at the very least, factual disputes over what the company knew, or should have known, of the risk that Bennett would assault other women at Wixom.

To begin with, Ford has not disputed the fact that Bennett used its test car to follow and expose himself to the high school girls. Nor could Ford dispute that it had clear notice of that flagrant misconduct: three witnesses saw what Bennett did and their testimony was confirmed by a conviction after a full trial on the merits.

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[5] As is apparent, the claim of negligent retention thus requires a court to admit evidence for the same reason that the evidence would be inadmissible in other claims against other defendants. Thus, as this Court has rightly held, in criminal and tort cases, evidence of other misconduct may not be admitted against an individual defendant if its only purpose is to show that the individual has a "propensity" for committing such acts. See, e.g, *People v VanderVliet*, 444 Mich 52, 508 NW2d 114 (1993). In a negligent retention claim, however, the fact that a company knows of past misconduct by an employee that establishes that he has a propensity to commit similar acts of misconduct in the future *is* admissible because that is an element of the tort that the plaintiff must establish.

[6] Again, the similarity between the negligent retention and hostile environment claims is apparent. See *Chambers*, 463 Mich at (sufficiency of the notice and reasonableness of remedy to determined from "totality of circumstances").

Ford, however, attempts to minimize the inferences that can be drawn from its knowledge of that misconduct by asserting that Bennett's acts were "off-duty, off-premises conduct with strangers" (Ford Br, 20). There is, however, a clear factual dispute over whether Bennett's misconduct was "off-duty." Moreover, even if the conduct was off-duty, which it was not, *Hersh* allows the jury to infer that the company should have known that an employee was dangerous on the job based upon misconduct that he committed before he ever worked for a company.

More fundamentally, Ford fails to consider the effect of the I-275 evidence if, as is required, all inferences from the evidence are drawn in favor of the plaintiff. If that evidence is so construed, the jury could conclude on that basis alone that Ford knew that Bennett was dangerous because he had defied the company's rules and used its property to perpetrate severe, dangerous, terrifying and criminal sexual harassment upon high-school girls. In fact, the jury could conclude that M-10 events should have alerted Ford to the fact that Bennett posed a greater danger inside the Wixom plant than he did on the public highways, because inside the plant he had power over his potential victims and could count on protection from the local management no matter what he did.

Ford's attempt to draw the inferences from the M-10 events in its favor is also in error for another fundamental reason. Ford attempts to separate the M-10 events from Maldonado's reports instead of considering them as part of the totality of circumstances known to the company. If it were possible for Ford's management to pretend that Bennett's abuse of "strangers" did not alert it to the danger that he posed in the plant, after Maldonado filed her reports with Howard, Ferris, and, indirectly, with Rush, that illusion could no longer be maintained. The abuse of the high-school girls corroborated

the notice that Maldonado gave—and Maldonado's reports confirmed that Bennett was dangerous both inside and outside the Wixom plant.

Moreover, the two reports together established that the danger that Bennett presented was extremely serious. If the reports were believed, he struck suddenly and without warning against persons who were either unknown to him (the high-school girls) or barely known to him (Maldonado). Together, the reports alerted Ford to the fact that Bennett resorted to extreme abuse immediately—exposing himself on all four occasions and assaulting Maldonado on three of those occasions. If the jury believed that evidence, it could thus conclude that by October 1998, Ford knew or should have known that Bennett was a very dangerous employee—and that the need for strong preventative action was urgent.

For that reason, Ford has apparently decided that it must claim that it did not know about Maldonado's reports before Bennett assaulted McClements. In the Court of Appeals, Ford attempted to disavow knowledge by claiming that Maldonado did not file her reports with officials who were sufficiently high in its chain of command. After the Court of Appeals properly rejected that claim, Ford has changed its view of the facts to add the new assertion there is supposedly no evidence that its officials received Maldonado's reports *before* Bennett assaulted McClements (see supra, 1-2; Ford Br, 7-8). But the order of events in this case is based on far more than conjecture—whether that term is defined precisely as this Court has done[7] or whether it is used in its more colloquial sense as Ford has done.

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[7] This Court has defined that term as "...an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Skinner v Square D*

Maldonado *testified* that she filed her reports in late October 1998. McClements *testified* on repeated occasions that Bennett assaulted her in late November or early December 1998. And McClements' testimony is corroborated by inferences that can be drawn from three known facts: (1) the fact that Bennett stopped using the cafeteria at Christmas, which she testified was "shortly after" his second assault upon her; (2) the fact that AVI moved McClements out of Café 1 shortly after the assaults and that AVI moved her "just prior" to February 1, 1999, which was the date on which her father died; and (3) the fact that she moved to Café 1 in early fall 1998, that the assaults occurred after a holiday, and that the only holidays after early fall 1998 were Veterans Day, Thanksgiving and Christmas, all of which occurred after October 1998.

Based upon the evidence in the record, the Court of Appeals properly concluded that the jury could determine that before Bennett assaulted McClements, Ford knew, or should have known, that there was a great danger that Bennett would sexually assault or harass other women inside the Wixom plant (Pl Apx, 54a).

In fact, Ford had far *more* knowledge of the danger that Bennett posed at Wixom than this Court found was sufficient to create a question for the jury in *Hersh*. Ford cites the past record of the employee in *Hersh*—but it fails to cite what the employer knew of that record. On that point, the most that was proved was that the employer "...in all probability was aware in some casual way of some prior criminal offense [by the employee]; that the employee had occasionally been drunk on the job; and that at times

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Co, 445 Mich 153, 162, 516 NW 2d 475 (1994). As the Court held, however, if the conclusion is deducible as an inference from other facts, it is not a conjecture. *Id.*

he had been belligerent." *Hersh v Kentfield Builders*, 19 Mich App 43, 45, 172 NW2d 56 (1969).[8]

In this case, Ford had clearer and far more definite knowledge of more recent and more serious work-related misconduct than the employer had in *Hersh*. The Wixom and State police told Ford that Bennett had stalked and exposed himself to the high-school girls. Maldonado told Ford that Bennett had exposed himself to and sexually assaulted her on three occasions in 1998 in ways that were serious enough to constitute criminal sexual conduct under the laws of the State of Michigan.

Despite that clear knowledge, Ford continued to employ Bennett in a position where he could do far more harm than the laborer in *Hersh*—it employed him as the manager of an entire department in a large plant that operated at all hours of the night.

The Court of Appeals thus correctly held that *Hersh* required that the jury determine whether Ford took reasonable steps to prevent the danger that Bennett so clearly posed to women at the Wixom plant.

C. McClements and other invitees were foreseeable victims of Bennett's abuse.

As the law of negligence has long held, the employer has a duty to protect those who are "readily identifiable as being reasonably endangered" by a particular risk. *Mason v Royal Dequindre, Inc.*, 455 Mich 391, 398, 566 NW2d 199 (2001). It is not necessary that "...the manner in which a person might suffer injury should be foreseen or anticipated in specific detail." *Clumfoot v St Clair Tunnel Co*, 221 Mich 113, 117, 190

[8] This Court did not set forth in detail the facts known to the company in its opinion in *Hersh*. But it did not fault the Court of Appeals for the factual findings that it made, and that Court did summarize those facts. The plaintiff relies on that summary here to establish what the company knew its laborer had done. See *Hersh*, 19 Mich App at 45.

NW 759 (1922). Nor is it necessary that the company foresee the specific victim—or the specific place or means by which she would be injured. *Schultz v Consumers Power Co*, 443 Mich 445, 452 n 7, 506 NW 2d 175 (1993). If there is a risk of harm to an identifiable group of persons, the jury must decide whether the specific harm to the plaintiff was foreseeable. *Bonin v Gralewicz*, 378 Mich 521, 526-527, 146 NW 2d 647 (1966).

For two reasons—both of which lack merit—Ford nevertheless claims that Bennett's assaults upon McClements were not foreseeable as a matter of law.

Citing this Court's decision in *Murdock v Higgins*, 454 Mich 46, 559 NW 2d 639 (1997), Ford first claims that Bennett's assaults upon McClements were, for some reason, not foreseeable. But in *Murdock*, this Court held that a supervisor in one state welfare office was not liable because a person previously under his supervision sexually abused a minor who had volunteered to work in another state welfare office where the supervisor's former employee had been transferred. This Court held that the former supervisor had no duty to the minor because he had "no idea that [his ex-employee] would have any professional contact with minors" in his new office, and, even if he did, he had no evidence that the ex-employee had ever abused someone with whom he worked in a professional capacity—or even definite knowledge that the former employee had ever had off-duty sexual relations with minors. *Murdock*, 454 Mich at 58-59.

As is clear, *Murdock* is a far cry from the facts present here. At all relevant times, Bennett was a manager and McClements was an invitee at the Wixom plant. Moreover, unlike the supervisor in *Murdock*, Ford knew that Bennett had sexually abused women on

four occasions during the course of performing his duties. Unlike in *Murdock*, the danger of further sexual assaults by Bennett upon women at Wixom was clearly foreseeable.

Ford's second claim is that Bennett's assaults upon McClements were not foreseeable because he perpetrated those assaults inside a cafeteria that AVI operated (Ford Br, 24-25). But if Ford had taken appropriate action, Bennett would not have been on the Wixom grounds so that he could gain access to that cafeteria.

Moreover, as the cafeteria is on Ford's property, there is neither evidence nor reason for believing that AVI had exclusive control over it. In fact, the evidence is clear that one door to the cafeteria was left open at all times and Ford employees often used that door to go into the cafeteria at times when it was closed. It was thus more than foreseeable that Bennett might enter it as he did during a time when no other Ford employees were present (Ford Apx, 182a-186a).

In fact, given that Ford knew that Bennett had violated the criminal laws to harass the high-school girls and Maldonado, it was surely foreseeable that he might walk past a sign telling him not to enter AVI's cafeteria if he decided to sexually assault McClements or anyone other woman who happened to work in that cafeteria.

As in *Hersh*—and indeed far more clearly than in *Hersh*—the jury must determine whether Ford failed to take action to stop the foreseeable risk that Bennett might sexually assault women who came into the Wixom plant, including women who worked in the cafeteria at that plant.

D. Ford's failure to take any remedial action proximately led to Bennett's assaults upon McClements.

After learned in August 1995 that Bennett had followed the high-school girls for miles and then exposed himself to them at high speed, Ford did nothing. In fact, years later—after Bennett had been proved guilty beyond a reasonable doubt—the plant manager testified that he still believed Bennett was innocent of the crime for which he had been convicted (Pl Apx, 110a).

Similarly, in fall 1998, when three company officials learned that Bennett had also perpetrated three sexual assaults upon Maldonado, *only* Ferris said *anything* to Bennett—and Bennett felt free to laugh in Ferris's face (Pl Apx, 107a).

On the basis of this evidence, the jury could reasonably conclude that Ford did absolutely nothing to prevent Bennett from harassing women at the Wixom plant. In fact, it could conclude that Ford had positively encouraged Bennett's assaults. When he learned that the company would do nothing after the police filed the report of what he had done on I-275 and after Ferris told him that Maldonado reported what he had done to her, Bennett reasonably concluded that he could do anything without fear for his job.

The fact that Bennett assaulted McClements one month after he laughed in Ferris's face is particularly telling evidence that Ford's failure to use due care proximately led to Bennett's assaults upon McClements. In fact, the close proximity in time, the on-going and serious nature of Bennett's misconduct, and the company's utter failure to do anything provides strong evidence on which the jury could base a verdict that Ford's negligence was a proximate cause of Bennett's later sexual assaults upon McClements.

E. The precedents Ford cites from other jurisdictions do not support either a change in Michigan law or the reversal of the Court of Appeals in this case.

In seeking to avoid a jury's determination in this case, Ford has selected from the hundreds of negligent retention cases decided by courts across the country those decisions where the connection between the employer and the tort was most attenuated—and then packaged language from those precedents in an attempt to suggest that the law of Michigan should be changed so that Ford can avoid the judgment of a jury in this case.

The argument does not wash. As will be seen, if the Wixom plant were located in *any* of the states whose precedents have been selected by Ford, the courts would hold that the jury must determine whether Ford was responsible for Bennett's assaults upon McClements.

Ford, for example, cites *Coughlin v Titus and Bean Graphics, Inc.*, 54 Mass App 633, 767 NE2d 106 (2002), in support of its claim that it should be exempt from liability here (Ford Br, 23). In that case, however, a Massachusetts company had hired a man who had served time for rape, felonious assault, and robbery to work at a warehouse where it stored equipment and supplies. Four hours *before* that employee was to start his shift, he encountered a *passerby* on the public sidewalk *outside* the warehouse. He lured her into the warehouse and murdered her. The Court held that the employer was not liable for the murder because:

> ...[T]he victim was neither a customer of Titus & Bean, nor an employee or business invitee at the time she was murdered. Furthermore, at the time that Kelly [the employee] committed the murder, he had not started work that day.
>
> *Coughlin*, 54 Mass App at 639.

The very words of *Coughlin*, however, make clear that the Massachusetts Court of Appeals would hold that a jury had to determine whether Ford was responsible for Bennett's assaults upon McClements because she was an invitee and because both she and Bennett were in the middle of their shifts at the time he assaulted her.

The courts of Colorado--another state whose precedents are cited by Ford--would also so hold. See Ford Br, 33-34, 37, citing *Connes v Molalla Transport Systems, Inc.*, 817 P 2d 567 (Colo Ct App 1991). In *Connes*, the Colorado Court of Appeals held that a trucking company was not responsible for a long-haul driver's rape of a clerk in a hotel where the driver stayed because the risk of such an assault was "extremely remote" and the burden of investigating the non-driving records of all such prospective employees was great. But as the Colorado Supreme Court later explicitly held, an employer in that state *is* responsible for sexual assaults perpetrated by one of its employees where, as here, it knew that the employee came into contact with members of the public during the course of his work and *knew* that the employee had a prior record of perpetrating sexual abuse during such contacts. *Diocese of Colorado*, 863 P 2d at 323-325.

The same is true in Minnesota, yet another state selected by Ford. See Ford Br, 18-19, citing *Yunker v Honeywell, Inc.*, 496 NW2d 419 (Ct App Minn 1993). In that case, the Court held that the company was not responsible for hiring an ex-offender as a custodian[9] but that the employer could be held responsible for that custodian's later murder of a co-employee because it *retained* the employee after learning that he had

[9] The Minnesota Supreme Court had previously held that employers may be held to have negligently hired an ex offender if he was hired to assume a managerial or other positions where the risk of harm to others was especially great. *Ponticas*, 331 NW2d at 912-913.

threatened physical harm to his eventual victim and to other employees at the work site. *Id.*, 496 NW2d at 423-424.

Finally, Ford would be responsible for Bennett's assaults upon McClements under the law of Illinois, yet another state selected by Ford. See Ford Br, 24, citing *Carter v Skokie Valley Detective Agency, Ltd*, 256 Ill App 3d 77, 628 NE2d 602 (1993). In *Carter*, the Illinois Court of Appeals held that a security company was not responsible for a guard's murder of a woman who gave the guard a ride to a new job site merely because she had first met him when he was assigned to work as a guard at the gas station where she worked. But both *Carter* and other decisions in Illinois made clear that employers in that state can held responsible for assaults upon invitees perpetrated by employees whom the company knows, or has reason to know, are dangerous. *Gregor v Kleiser*, 111 Ill App 3d 333, 443 NE 2d 1162 (1982).

In sum, after what was undoubtedly a diligent search, Ford has cited no state in which the courts have held that that the jury would not be allowed to determine *in this case* whether Ford was responsible for Bennett's assaults upon McClements because it negligently retained or supervised him after being put on notice of his prior sexual misconduct and assaults.

III

NEITHER THE ELLIOTT-LARSEN ACT NOR THE MICHIGAN RULES OF EVIDENCE PREEMPT PLAINTIFF'S COMMON-LAW CAUSE OF ACTION FOR NEGLIGENT RETENTION.

A. The Elliott-Larsen Act does not preempt plaintiff's cause of action against Ford for negligently retaining or supervising Bennett.

According to Ford, McClements' sole remedy for the assaults she endured is a claim against her employer, AVI, under the Elliott-Larsen Act (Ford Br, 25-31).

McClements never filed that action because she did not believe that AVI had done anything wrong.[10] But even if she had believed that a claim against AVI was justified, it is apparent that AVI's ability to stop Bennett's harassment was limited. At the risk of offending high officials of Ford, AVI might have barred Bennett from the cafeteria that it operated for Ford. It might also have beseeched Ford to take other action against Bennett. But if Ford turned AVI down, it could offer McClements little or no protection inside the grounds of the Wixom plant.

According to Ford, however, that paltry remedy forfeits McClements' common-law cause of action against Ford. Ford cites much authority in purported support of this claim (Ford Br, 25-31)—but none of that authority actually supports Ford's assertion.[11]

In fact, most of the authority cited by Ford holds that a statutory remedy for enforcement of a common law right is not exclusive but is rather only cumulative. See, e.g., *Pompey v General Motors*, 385 Mich 537, 553-554, 189 NW2d 113 (1971). As there has been a common-law remedy for assault for as long as there has been a State of Michigan—and a common-law remedy for negligently retaining one who perpetrated

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[10] Ford notes that McClements did file a complaint of sexual harassment under AVI's procedures against a rank-and-file employee of another contractor at the plant (Ford Br, 26). As McClements testified, she did not file a complaint with AVI against Bennett because she knew he was a high manager of Ford and she believed it would do not good and might result in her getting fired if she complained (Dep of McClements, 549; Pl Apx 86a). The fact McClements filed a charge with against one man who harassed her and not against another is not, however, even relevant to Ford's claim that it is entitled to judgment as a matter of law.

[11] Ford's relies on cases holding that a plaintiff cannot avoid the strictures of the Elliott-Larsen Act by asserting that the Act had created an implied contractual term not to engage in sexual harassment or discrimination. See, e.g., *Hartliep v McNeilab, Inc.*, 83 F 3d 767 (CA 6 1996). As is apparent, those cases are not even relevant to claims where the plaintiff asserts longstanding common law torts.

such an assault for almost as long—it is obvious that whatever remedies McClements may have under the Act are cumulative, not exclusive.

Moreover, in a statutory provision that is not cited by Ford, the Legislature made that abundantly clear by providing that the "[The Elliott-Larsen Act" shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of the state." MCL 37.2803.

In an attempt to avoid that statute and *Pompey*, Ford suggests that the remedy in *Hersh* applies only to "violent assaults" (Ford Br, at 29). But *Hersh* does not suggest that there is some minimum (and indefineable) threshold of violence that must be crossed in order to bring a claim for negligent retention. Moreover, McClements—and a jury—might find that a woman who was grabbed from behind, spun around, and subjected to an unwanted tongue forced into her mouth was in fact subjected to a "violent" assault.

As the Ninth Circuit and numerous other courts have held, women victimized by sexual assaults have a claim under Title VII, but it is surely not the exclusive remedy that they have. Even for women who are employed by the same company as their assailant, "Rape can be a form of sexual discrimination, but we cannot say to its victims that it is nothing more." *Brock v United States of America*, 64 F 3d 1421, 1423 (CA 9 1995). See also *Kibbe v Potter*, 196 F Supp 2d 48 (D Mass 2002)(collecting federal authorities); *Greenland v Fairtron Corporation*, 500 NW2d 36, 38-39 (Sup Ct Iowa 1993)(Iowa civil rights act does not bar common-law claim for sexual assault); *Maksimovic v Tsogalis*, 177 Ill 2d 511, 518-519, 687 NE2d 21 (1997)(same for Illinois act).

That conclusion is even more clearly true for one is not employed by the same company as the man who assaulted her.[12] Ford's claim that it is exempt from the coverage of the Act—but that McClements' claim against it is preempted by the Act—is clearly and obviously wrong.

B. Neither the Michigan Rules of Evidence nor the expungement order nor evidentiary rulings in other cases foreclose the plaintiff's negligent retention claim.

Ford's assertion that the Michigan Rules of Evidence, the expungement order, or evidentiary rulings in other cases bar McClements' negligent retention claim has even less merit than its assertion that the Elliott-Larsen Act preempts that cause of action.

The Michigan Rules of Evidence establish the standards by which parties may prove facts that the substantive law of the state deems material. MRE 404, for example, provides that "evidence of other crimes, wrongs, or acts" may be admissible to prove a number of matters "*when the same is material*"—with materiality determined by the substantive law of Michigan.

Neither MRE 404 nor the Michigan Rules of Evidence as a whole, however, even claim to affect the substantive law of the state of Michigan. Nor could they affect that substantive law. As this Court has held, under Article 6, Section 5 of the Constitution, the Court is "...not authorized to enact court rules that establish, abrogate, or modify the substantive law." *McDougall v Schanz*, 461 Mich 15, 27, 597 NW2d 148 (1999).

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[12] There are very few cases addressing the question of whether Title VII or an equivalent state statute preempts a claim of negligent retention filed by a woman assaulted by another employee of the company for whom she works. In most states, such a claim is probably barred by the immunity provisions of the state worker's compensation statute. The issue therefore only comes up in cases like the present one, where the plaintiff is not a common law employee of the employer of the man who assaulted her.

The expungement order is also irrelevant to plaintiff's claim. Whatever effect that order may have on the use of the conviction after the date that order was entered, it can not wipe out Ford's knowledge of what Bennett *did* on I-275.

Nor does the order retroactively change what Ford *knew* in 1995 and 1998. If, for example, an employer lawfully refused to hire an individual because it knew that he had a prior record, that decision would not become unlawful if a court later expunged the conviction. Likewise, if Ford failed to take action after knowing that Bennett's misconduct had been confirmed by a criminal conviction, its negligence in ignoring that conviction would not disappear if a court later expunged that conviction.

Contrary to Ford's claims, McClements' cause of action is also not affected by the fact that judges in other cases have excluded the conviction under MRE 403 (Ford Br, 33). In those cases, the trial judges wrongly attempted to consider that evidence in isolation from the totality of circumstances known to the company. They also wrongly took from the jury the task of evaluating what harm was foreseeable as a result of Bennett's crime on I-275—whether that crime was considered in isolation or, as it should be, as part of the totality of the circumstances.

More fundamentally, however, the trial judges did not understand that in a negligent retention claim or a hostile environment claim, evidence that Ford knew what Bennett had done on I-275 was admissible against the company for the precise reason that it could not be admitted against Bennett—namely, that it showed that he had a propensity for committing sexual assaults, a propensity that Ford had a duty to abate. See discussion in note 5, supra.

As a result of all of these factors, those trial judges could not properly weigh the relevance of the M-10 events before deciding to exclude it under MRE 403. But whether their evidentiary rulings were correct[13] obviously has no effect on whether the plaintiff has stated a cause of action here.

IV

THE COURT SHOULD CONSTRUE THE STANDARDS FOR THE CLAIM OF A HOSTILE ENVIRONMENT UNDER THE ELLIOTT-LARSEN ACT CONSISTENTLY WITH THE STANDARDS LONG ESTABLISHED FOR A COMMON LAW CLAIM OF NEGLIGENT RETENTION.

A. The standards for a claim under the Act should be construed to be consistent with long-established common-law precedent.

In a series of decisions, the Court of Appeals established two onerous requirements for plaintiffs asserting that a company was responsible for a hostile work environment under the Elliott-Larsen Act. First, the Court held, the victim had to show not only that the company knew that it had a dangerous employee who was creating a hostile work environment, she had to show she complained to the company about the harassment she had suffered. Second, in order to show knowledge by the company, the plaintiff had to show that she complained to a member of "higher management." See *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 637 NW 2d 536 (2001), *lv*

[13] If this Court should sustain McClements' claim that Ford negligently retained Bennett, the Court should reverse or remand the rulings on the I-275 evidence for reconsideration in light of its ruling in this case. If the I-275 evidence forms a crucial part of the claim of negligent retention—which it does—it makes no sense to admit it on the common law claim and to exclude it under a hostile environment claim when the two claims are essentially varieties of the same cause of action. See supra, notes 4-6. In particular, it makes no sense that a jury consider what Bennett did on I-275 in McClements' common-law claim—while a jury deciding her statutory claim or that in the *Elezovic, Maldonado*, or *Perez* cases would not be allowed to consider the same facts. See *Maldonado v Ford*, 2004 WL 868657 (2004), *app lv pending* Sup Ct Case No. 126274; *Perez v Ford*, 2005 WL 562637 (2005).

den 466 Mich 888, 646 NW2d 475 (2002); *Jager v Nationwide Truck Brokers, Inc.*, 252 Mich App 464, 652 NW 2d 503 (2002), *lv den* 468 Mich 884, 661 NW 2d 232 (2003); *Elezovic v Ford*, 259 Mich App 187, 673 NW2d 776 (2003), *lv granted* 470 Mich 892, 683 NW2d 144 (2004).

Ford asserts that because the common law of negligent retention should not provide greater rights than claims filed under the Elliott-Larsen Act, this Court should graft onto the common law the standards announced by the Court of Appeals in *Sheridan*[14] and the cases that followed it (Ford Br, 38, citing *Sheridan*, 247 Mich App at 627-628)

McClements *agrees* with Ford's assertion that negligent retention claims under the common law and hostile environment claims under the Act should be construed consistently insofar as respondeat superior is concerned (Ford Br, 33-34). As this Court held, the courts should use the common law to construe the standards for respondeat superior liability under the Elliott-Larsen Act—not decisions rendered under that Act to construe the common law. *Chambers v Trettco*, 463 Mich 297, 614 NW2d 910 (2000).

As set forth in the Plaintiff's Brief in Support of her Cross Appeal, *Sheridan* and *Jager* erred in their construction of the standards to be applied under that Act. Extending that error to common law negligent retention claims where the underlying tort involved discrimination would compound that error. Indeed, it would mean that those victimized

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[14] The plaintiff has asserted that *Sheridan* is more limited and holds only that prior acts of misconduct, where the employer took remedial action, can not be used to prove notice that an employee poses a danger of perpetrating further harassment because the company had no way of knowing that its prior remedial action was insufficient. As this Court has granted leave from a decision in which the Court of Appeals held that a complaint by a single coworker could not give notice of the harassment, the dispute over the scope of *Sheridan's* holding is now of less importance. *Elezovic*, 259 Mich App at 196.

by discriminatory assaults by a negligently retained employee would have more difficulty proving a claim against the employer than the victim of a garden-variety senseless assault untainted by discrimination.

This Court should correct that error—not compound it, as Ford requests, by adopting the *Sheridan-Jager* standards as the ones to be applied in deciding common-law claims where the plaintiff was the victim of a tort that had a discriminatory motivation.

B. Ford wrongly asks this Court to dismiss a claim for negligent retention unless the plaintiff herself complained that the employee had committed a prior act of misconduct.

The common law claim of negligent retention is based on the premise that an employer breached the duty that it owes to invitees and other members of the public by wrongly ignoring past misconduct that demonstrates that an employee poses a danger of committing similar misconduct in the future. *Hersh, supra.*

As the usual victims of that misconduct were customers and other invitees, the common law did not require that the victim herself[15] be victimized beforehand—or, still less, that she file a complaint and await an unsatisfactory remedy from the employer before commencing suit. Indeed, as most of the victims were by definition on the employer's premises for only a short time, such a requirement would destroy the cause of action altogether.

Ford nevertheless asserts that by holding that the prior reports by the high-school girls and by Maldonado could alert it to the danger that Bennett posed to all women at

[15] As she is a woman, the plaintiff refers to the victim as a woman. Obviously, the victim in a negligent retention claim may be either a man or a woman. It is, however, revealing that many of the cases from other jurisdictions involve women victimized by sexual attacks. In some ways, therefore, the negligent retention cause of action was one of the first claims that sought to prevent a sexually hostile work environment.

Wixom, the Court of Appeals supposedly "violated a cardinal rule with respect to negligence: the defendant has to have notice of the condition before any duty arises" (Ford Br, at 38, citing *Freed v Simon*, 370 Mich 473, 475, 122 NW 2d 813 (1963). But Ford should read *Freed*. In that case, this Court held that a person injured by a dangerous condition in an employer's equipment could show that the employer had notice of the dangerous condition *because others had been injured by that condition before*:

> We...reaffirm...that "Evidence of prior accidents has always been admissible to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident" and that "the rule now seems to be established that evidence of prior accidents at the same place and arising from the same cause is admissible not only to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident, but to show the defendant's negligence on the theory that defendant, having notice or knowledge of the defect, is held to a higher degree of care by reason of his notice of such dangerous condition than he otherwise would be.
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> *Freed*, 370 Mich at 475.

If it is a "cardinal principle" of negligence law that Ford *may* be put on notice of a dangerous condition in its equipment by a prior injury to another, why may Ford not be put on notice that it has a dangerous employee on its staff by reason of that employee's prior assaults upon others?

Ford has no answer to that question because it fails to understand that under the common law and under the Elliott-Larsen Act the focus must be on whether the employer has or should have knowledge that a particular supervisor is dangerous—not whether the employer knows the names of all of his victims.

As is apparent, under the common law, the employer has to know that the offending employee is dangerous. *Hersh*. In a series of well-reasoned decisions, the federal courts have so held under Title VII. See, e.g. *Hirase-Doi v U.S. West*

Communications, Inc., 61 F 3d 777, 783-784 (CA 10 1995), and other authorities cited in Plaintiff's Brief in Support of her Cross Appeal, at 30. Finally, in a recent decision on a record very similar to the one in this case, the Michigan Court of Appeals held that Ford could be held responsible for Bennett's August 1999 sexual harassment of yet another woman at Wixom because it knew that Bennett was dangerous based on the reports that Maldonado filed:[16]

> Although a complaint of a single coworker may be insufficient to establish notice of a plaintiff's claim of harassment, *Elezovic v Ford Motor Co.*, 259 Mich App 187, 196, 673 NW 2d 776 (2003), *lv granted* 470 Mich 892, citing *Sheridan*, 259 Mich App at 627-628, the plaintiff provided much more than one complaint. One coworker [Maldonado] testified at her deposition that she told a production manager on several occasions that Bennett was sexually harassing her; she also told a superintendent [Ferris] during a time he was temporarily assigned to labor relations...Moreover, when the coworker reported Bennett's acts towards herself, she also mentioned that Bennett had harassed another employee [Elezovic] as well.
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> *Perez v Ford Motor Company and Bennett*, 2005 WL 562637 (2005).

As *Perez*, the federal precedents, and the common law all recognize, the question in deciding a motion for summary disposition is whether the company had notice of the dangerous employee, not whether it knew all of his victims or whether those victims had managed to file a report of that abuse.[17]

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[16] The record in *Perez* differs in three ways from that present in this case and in *Elezovic*. First, because Maldonado learned in November 1998 that Bennett had also abused *Elezovic*, she reported that fact to Ford officials before Bennett abused Perez. Second, because Bennett's abuse of Perez occurred ten months after he assaulted McClements, Maldonado had filed the reports of Bennett's harassment of her and of Ms. Elezovic with other Ford officials in addition to Howard, Ferris and (indirectly) Rush. Third, Perez offered testimony from still other of Bennett's victims and an expert report from Dr. Louise Fitzgerald as to the culture of harassment at Wixom, including its effect on employees' ability to report harassment to their supervisors.

[17] Ford spends considerable time discussing the asserted "duty" of victims to report abuse so that Ford can exercise its "right" to investigate complaints (Ford Br, 34-35). But there is no such duty or right. The Act imposes a duty on Ford to act to prevent sexual

C. Ford wrongly asks this Court to dismiss the plaintiff's claim for negligent retention unless the prior complaints were lodged with higher management.

Finally, for three reasons, this Court should reject Ford's claim that McClements may not bring an action because Maldonado did not file complaints of Bennett's harassment with "higher management," as that term is defined in the Court of Appeals' Opinions in *Sheridan* and *Jager*.

First, Ford's own policies informed employees that they could report complaints of sexual harassment to any supervisor—who in turn had a duty to report that complaint to human resources whether he regarded the complaint as justified or not (Pl Apx, 121a-122a).

Second, as *Sheridan*, and *Jager* have defined "higher management" to include persons who have "significant influence" in the hiring, firing and disciplining of the harassing employee, these is a clear factual dispute over whether the Production Manager, an official in labor relations, and the Director of Labor Relations are "higher management" as those cases define that term.

Third, and most important, neither *Chambers*, nor the common law, nor the well-reasoned decisions by the federal courts support any requirement that employees complain to higher management—and for good reason.

As set forth in Plaintiff's Brief in Support of her Cross Appeal, due to fear, despair, guilt, shame, and a host of similar factors, most victims of sexual harassment do not report it at all—and those who do report it do so after considerable delay to lower

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harassment when it receives notice that establishes a substantial probability that that harassment is occurring. It may be sued for breaching that duty—but there is no sanction for victims who do not report abuse, especially if the company knows about from other sources.

level supervisors in whom they have some trust. See Pl Br, 29, citing Note, *Notice in Hostile Environment Discrimination Law*, 112 Harv L Rev 1977 (1999); Beiner, *Sex, Science and Social Knowledge: the Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 Wm & Mary J. Women & L 273 (2001).

Despite the fact that it is far more difficult for a woman to report that she has been a victim of sexual harassment than for an injured person to report that she has slipped on a banana peel, *Sheridan* and *Jager* make it far more difficult for a woman to file a legally sufficient report of sexual harassment. Most victims almost certainly will not know that they must complain to a high management official. Even if a particular victim is somehow aware of that requirement, she has no way of determining which officials are sufficiently high. Finally, even if she identifies who such an official is, she must track down him down—and if, as here, the perpetrator is a high management official, she may have to confront the plant manager or go to the Glass House in order to file her complaint.[18]

The *Sheridan-Jager* requirements thus assure that most women will never file a valid report of the overwhelming majority of the sexual harassment that they endure—and that employers will therefore have correspondingly little incentive to eliminate that harassment. If the *Sheridan-Jager* requirement were adopted by this Court under both the Act and the common law, the cost to the women, to the policies of the Act, to the victims of assaults, and to the State as a whole would be extremely high.

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[18] Ford says that complaints with the production manager and labor relations at Wixom are not complaints filed with "high management officials." The plaintiff and her counsel, however, are still attempting to determine which officials Ford believes are part of higher management.

There is no need for a requirement so onerous that it undercuts the policy of eliminating or minimizing sexual harassment and, in general, if assaults by dangerous employees. *Sheridan* declared that that it was necessary to assure that those officials who could remedy the situation had notice of the harassment or other misconduct. *Sheridan*, 247 Mich App at 622-623. But the *Sheridan* Court forgot what the common law had long ago recognized: a company agent may not have the authority to repair a problem but he may still have the ability and knowledge to report it to those who do have that authority—and the law accordingly imposes upon them a duty to do so.

In a decision that is directly on point, Judge Posner has written a thorough and persuasive opinion criticizing decisions holding that victims of sexual harassment must complain to "higher management." As the Seventh, Second and Third Circuits have held—and as common sense and the common law dictate—complaints of sexual harassment should be deemed effective if they are filed with company officials who have power to remedy the harassment *or* with those who have influence with such officials *or* with those who are charged by law or policy with a duty to report the harassment to officials who have that power or influence. *Young v Bayer Corp*, 123 F 3d 672, 674 (CA 7 1997). *Accord. Torres v Pisano*, 116 F 3d 625, 636-638 (CA 2 1997), *cert den* 522 US 997 (1997); *Bonenburg v Plymouth Township*, 132 F 3d 20, 27 n 7 (CA 3 1997).

In a word, the standards of *Sheridan* should be modified to conform to those of the common law—not the reverse—if sexual harassment and, in general, assaults and other misconduct by dangerous employees is to be minimized or eliminated.

In this case, the jury should be instructed that it can charge Ford with the knowledge that its agents had—and with the responsibility for taking reasonable action

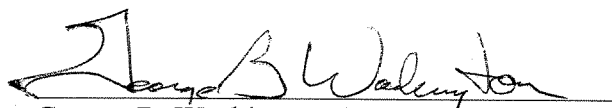
based upon that knowledge. If the jury then finds that Ford failed to take reasonable action and that its failure proximately led to Bennett's assaults upon McClements, that decision would not only compensate the victim but would also encourage employers to prevent repeated acts of flagrant misconduct like those that Ford allowed to occur at Wixom.

As the Court of Appeals held, this matter should be remanded for trial so the jury can determine what Ford knew, when it knew it, whether it acted reasonably in light of the knowledge that it had, and, if not, whether McClements was a victim of Ford's negligence as well as of Bennett's assaults.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, the plaintiff-appellee Milissa McClements asks this Court to affirm the decision of the Court of Appeals and to remand this matter for trial on her claim that Ford negligently retained or supervised Daniel Bennett in his position as the Superintendent of the Pre-Delivery Department at the Wixom Assembly Plant.

By the plaintiff-appellee's attorneys,

By: 

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